

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 24, 2008

**SHELVY BAKER, aka KWAME ALI v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County  
No. 2002-A-112 Cheryl Blackburn, Judge**

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**No. M2007-02865-CCA-R3-PC - Filed July 3, 2008**

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The Petitioner, Shelvy Baker, aka Kwame Ali, appeals the Davidson County Criminal Court's summary dismissal of his petition for post-conviction relief. The post-conviction court determined that the petition was filed outside the statute of limitations. On appeal, the Petitioner contends that due process considerations require tolling of the limitations period under the holding of Williams v. State, 44 S.W.3d 464 (Tenn. 2001). Upon our review of the record, we reverse the judgment of the post-conviction court and remand for a hearing on the timeliness of the Petitioner's petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;  
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Shelvy Baker, aka Kwame Ali, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

After a trial by jury on August 23 and 24, 2004, the Petitioner was convicted of second degree murder. See Tenn. Code Ann. § 39-13-210. The trial court sentenced him to twenty-five years to be served at one hundred percent. This Court affirmed his conviction on direct appeal. See State v. Shelvy A. Baker, No. M2005-00298-CCA-R3-CD, 2006 WL 2682820 (Tenn. Crim. App., Nashville, Sept. 14, 2006). No application for permission to appeal to the Tennessee Supreme Court was filed.

On November 7, 2007, the Petitioner, incarcerated and proceeding pro se, mailed his petition for post-conviction relief.<sup>1</sup> The Petitioner sought relief on the basis of (1) ineffective assistance of counsel, (2) insufficient evidence to support his conviction, (3) prosecutorial misconduct, and (4) illegality of his sentence. Within his allegations of ineffective assistance, he stated that he received ineffective assistance when trial counsel “unilaterally terminated appellate process without [P]etitioner’s knowledge or consent after assuring the [P]etitioner that he would ‘take the case all the way to the Supreme Court . . . .’”

The post-conviction court summarily dismissed the petition by order dated November 26, 2007, finding that the petition was barred by the one-year statute of limitations. See Tenn. Code Ann. § 40-30-102(a). The post-conviction court did not address in its order whether due process required tolling of the limitations period, stating only that “none of Petitioner’s claims fall within any of the recognized exceptions to the statute of limitations.” See Tenn. Code Ann. § 40-30-102(b). This appeal followed.

### ANALYSIS

Tennessee Code Annotated section 40-30-102(a) provides that a claim for post-conviction relief must be filed “within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.” Tenn. Code Ann. § 40-30-102(a). The petition in this case, mailed on November 7, 2007, was untimely because it was filed after expiration of the one-year statute of limitations. This Court’s opinion affirming the Petitioner’s conviction was filed on September 14, 2006. No Tennessee Rule of Appellate Procedure 11 application for permission to appeal to the supreme court was filed. Therefore, the post-conviction statute of limitations began to run at the date of the final action of the “highest state appellate court to which an appeal [was] taken,” which was the date our direct appeal opinion was filed. See Tenn. Code Ann. § 40-30-102(a); see also Johnny Shields v. State, No. W2004-02625-CCA-R3-PC, 2006 WL 525912, at \*2 (Tenn. Crim. App., Jackson, Mar. 3, 2006).

The Petitioner, relying on Williams v. State, 44 S.W.3d 464 (Tenn. 2001), argues that due process considerations require tolling of the statute of limitations because trial counsel deprived him of a reasonable opportunity to seek post-conviction relief. Specifically, he points to the following facts: (1) counsel failed to notify the Petitioner that counsel did not intend to file a Rule 11 application for permission to appeal; (2) counsel failed to formally withdraw as the attorney of record or otherwise failed to inform the Petitioner of counsel’s withdraw; and (3) counsel assured “the Petitioner that he would take the case all the way to the Tennessee Supreme Court.”

In Williams, the Tennessee Supreme Court held that due process may require tolling of the statute of limitations for filing a post-conviction petition where the petitioner may have been deprived by his counsel of a reasonable opportunity to seek post-conviction relief. 44 S.W.3d at 467.

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<sup>1</sup> We glean this information from the post-conviction court’s order of summary dismissal, stating that the envelope shows the petition was post-marked on November 7, 2007.

In Williams, the petitioner was convicted of first degree murder and sentenced to life imprisonment in 1993. Id. at 465. On January 9, 1995, his conviction was affirmed by the Court of Criminal Appeals. Id. Thereafter, trial counsel terminated representation. “The [petitioner] averred that his trial counsel failed to notify him of counsel’s withdrawal from the case, or to explain to him his rights for filing a pro se petition to” the Tennessee Supreme Court. Id. Trial counsel filed a formal motion to withdraw on October 18, 1995, in which trial counsel sought permission for the petitioner to proceed with a delayed appeal to the Tennessee Supreme Court. Id. at 465-66. The trial court denied the request. Id. at 466. On November 8, 1995, trial counsel filed an application for permission to appeal to the Tennessee Supreme Court, which was denied as untimely. Id. Thereafter, on October 24, 1996, the petitioner, proceeding pro se, filed a petition for post-conviction relief. Id. The petition was dismissed by the post-conviction court without a full evidentiary hearing. Id. at 465. Although the petition was filed beyond the statutory limitations period, our supreme court remanded the case to the post-conviction court to determine whether due process considerations tolled the statute of limitations based on counsel’s actions. Id. at 467.

In the instant case, the Petitioner avers that he believed trial counsel was continuing to represent him through the appeals process. The Petitioner states that trial counsel assured him “that he would take the case all the way to the Tennessee Supreme Court.” The Petitioner further claims that counsel failed to notify him that counsel did not intend to file a Rule 11 application for permission to appeal and that counsel failed to formally withdraw as the attorney of record or otherwise failed to inform the Petitioner of his withdrawal.

Based on Williams, we conclude that the post-conviction court erred in dismissing the petition without conducting a hearing to make determinations similar to those outlined in Williams. See Eric Wright v. State, No. W2001-00386-CCA-R3-PC, 2001 WL 1690194, at \*2 (Tenn. Crim. App., Jackson, Dec. 17, 2001). Therefore, we are constrained to reverse the post-conviction court’s summary dismissal of the petition and remand for an evidentiary hearing

to determine (1) whether due process tolled the statute of limitations so as to give the [Petitioner] a reasonable opportunity after the expiration of the limitations period to present his claim in a meaningful time and manner; and (2) if so, whether the [Petitioner’s] filing of the post-conviction petition in [November 2007] was within the reasonable opportunity afforded by the due process tolling.

Williams, 44 S.W.3d at 471.

### CONCLUSION

Based upon the foregoing reasons, we reverse the post-conviction court’s summary dismissal of the Petitioner’s petition for post-conviction relief and remand for further proceedings consistent with this opinion.

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DAVID H. WELLES, JUDGE